Supreme Court, U. S.
FILED
OCT 24 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1978

No. 78-694

JOHN JOSEPH BARONE, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

JOHN CZARNECKI
HAYWARD, COOPER, STRAUB & CRAMER
Suite 300
900 Adams Street
Toledo, Ohio 43624
(419) 241-1200
Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

TABLE OF AUTHORITIES III

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

A.1. Whether, in Federal Prosecutions, the Ruling in *Franks v. Delaware*, ... U.S. ..... (decided June 26, 1978) Should Be Extended to Provide for Quashing Warrants Obtained Pursuant to *Intentionally* Misleading Affidavits.

2. Whether Technically Inculpatory Statements Made by an Informant Are Invariably Sufficient to Establish His Reliability and Credibility Under *United States v. Harris*, 403 U.S. 573 (1971).

B.1. Whether *Costello v. United States*, 350 U.S. 359 (1956), Can Be Read to Permit Absolutely *No* Investigation Into the Quality of Evidence or the Method of Presentation to a Grand Jury.

2. Whether in Order to Provide Some Potential Check on Presentations to Grand Juries, This Court Will Exercise Its Supervisory Power to Require Recordation of Grand Jury Proceedings in the Federal District Courts.

CONSTITUTIONAL PROVISIONS AND STATUTES 3

STATEMENT 4

A. The Search and Seizure Issue 4

B. The Motion to Dismiss the Indictment 7

REASONS FOR GRANTING THE WRIT 9

A. Search and Seizure 9

1. This case presents an opportunity for the Court to further define the ruling of *Franks v. Delaware*, ... U.S. ..... (decided June 26, 1978) and to apply the rationale thereof to the federal courts in the exercise of its supervisory power 9

2. There exists an almost universal misconception as to the holding in *United States v. Harris*, 403 U.S. 573 (1971), which is generally cited for a proposition supported by only a minority of the Supreme Court in that case 11

B. The Grand Jury Proceedings 12

1. This case presents a fact-pattern within which the Court may define minimum standards for the presentation of evidence to grand juries and the preservation of the record of testimony taken therein 12

CONCLUSION 16

APPENDICES:

A. Opinion of Court of Appeals A1

B. Judgment of Court of Appeals A21

C. Order Denying Petition for Rehearing A22

TABLE OF AUTHORITIES

Cases

Aguilar v. Texas, 378 U.S. 108 (1964) 9

Branzburg v. Hayes, 408 U.S. 665 (1972) 13, 15

Costello v. United States, 350 U.S. 359 (1956) 2, 13, 14

Ex Parte Bain, 121 U.S. 1 (1887) 13

Franks v. Delaware, ... U.S. ....., 46 U.S.L.W. 4869 (June 26, 1978) 2, 7, 9, 10, 11

People v. Cook, ... P.2d ....., 24 Cr.L.Rptr. 2004 (Cal.Sup.Ct. decided 9/8/78) 10, 11

Spinelli v. United States, 393 U.S. 410 (1969) 9

State v. La Martiniere, ... So.2d ....., 24 Cr.L.Rptr. 2027 (La.Sup.Ct., decided 9/5/78) 11

United States v. Calandra, 414 U.S. 338 (1974) 13, 14

United States v. Dionisio, 410 U.S. 1 (1973) 13

United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) 14, 15

United States v. Harris, 403 U.S. 573 (1971) 2, 7, 11, 12

United States v. Luna, 525 F.2d 3 (6th Cir. 1975), *cert. denied* 424 U.S. 965 (1976) 10

Constitutional Provisions and Statutes

21 U.S.C. §841(a)(1) 1, 3

21 U.S.C. §846 ..... 1, 3

28 U.S.C. §1254(1) 2

United States Constitution:

Amendment IV 3

Amendment V 4

Other

American Bar Association—Model Code of Pre-Arraignment Procedure (Tent. Draft No. 5, 1972) 15
S. 3274, 94th Congress, 2d Session (1976) 15
H.R. 1160, 94th Congress, 2d Session (1976) 15
H.R. 94, 95th Congress, 2d Session (1977) 15
S. 1449, 95th Congress, 2d Session (1977) 15
Excerpt from Speech—Prof. Charles Ruff before 1975 Judicial Conference of the District of Columbia 14
Government's *Petition for a Writ of Certiorari, United States v. Harris*, 403 U.S. 573 (1971) 12
Brief of United States, United States v. Harris, 403 U.S. 573 (1971) 12
J. Kramon, *The Grand Jury: An Overview*, THE JOURNAL OF THE SECTION OF LITIGATION, ABA v.4, n.4, p. 8 (1978) 15

Supreme Court of the United States

October Term, 1978

No. .....

JOHN JOSEPH BARONE, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The petitioner, defendant-appellant below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on August 1, 1978, affirming his conviction under a two count indictment for violations of 21 U.S.C. §846 and 21 U.S.C. §841(a)(1).

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. A1-A20) is not yet reported.

JURISDICTION

The Judgment of the Court of Appeals (App. B, *infra*, p. A21) was entered on August 1, 1978. A petition for rehearing and for rehearing in banc was filed on August 16, 1978. The petition for rehearing was considered on the merits and denied on September 26, 1978 (App. C, *infra*, p. A22).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

A.1. Whether, in Federal Prosecutions, the Ruling in *Franks v. Delaware*, ... U.S. ..... (decided June 26, 1978) Should Be Extended to Provide for Quashing Warrants Obtained Pursuant to *Intentionally* Misleading Affidavits.

2. Whether Technically Inculpatory Statements Made by an Informant Are Invariably Sufficient to Establish His Reliability and Credibility Under *United States v. Harris*, 403 U.S. 573 (1971).

and

B.1. Whether *Costello v. United States*, 350 U.S. 359 (1956), Can Be Read to Permit Absolutely *No* Investigation Into the Quality of Evidence or the Method of Presentation to a Grand Jury.

2. Whether in Order to Provide Some Potential Check on Presentations to Grand Juries, This Court Will Exercise Its Supervisory Power to Require Recordation of Grand Jury Proceedings in the Federal District Courts.

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner was convicted of violations of 21 U.S.C. §841(a)(1) and 28 U.S.C. §846. The relevent provisions of those statutes are as follows:

§841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

* * * * *

§846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub.L. 91-513, Title II, §406, Oct. 27, 1970, 84 Stat. 1265.

He raises constitutional arguments based on the Fourth and Fifth Amendments to the Constitution of the United States. The applicable texts of those provisions are:

AMENDMENT IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, sup-

ported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

A. The Search and Seizure Issue

Petitioner raised on appeal the denial, by the trial court, of his Motion to Suppress Evidence discovered at his home after his arrest. The search was conducted pursuant to a warrant. The Affidavit in support of the Application for Warrant was made by an agent of the Cincinnati D.E.A., Augustine Ginetz. Agent Ginetz represented to the magistrate that his information was secured from a reliable, albeit unnamed, informant. His Affidavit reads as follows:

> This affiant received information from an informant, who has provided me with information which has been reliable and on which arrest have (sic) been

based and a considerable quanity (sic) of narcotics have (sic) been conficated (sic) on July 6th and 7th of 1975. The informant further states on this date, July 7th 1975, that on June 30th 1975, he was at the residence at 2575 Indian Creek Rd and personally observed a large quanity (sic) of marijuana, cocaine, amphetamines and barbituates which belong to John Joseph Barone, Jr., who is a resident at this address. The informant further states that on June 30th 1975 that John Joseph Barone, Jr, did give him $10,000.00 to go to Columbia (sic) South America to use to purchase cocaine, which he did. John Joseph Barone, Jr. was arrested by Federal Agents on July 7th 1975 when taking possession of the above purchase of cocaine. The informant further states that there is (sic) still large quanites (sic) of drugs at the residence at 2575 Indian Creek Rd, which he observed on June 30th 1975.

At trial, the government revealed that the unnamed informant was one Norman Richard Depp. Depp and Ginetz met for the first time on the night that the affidavit was executed. On the preceding day, Depp had been arrested, with an accomplice, coming into the Miami International Airport carrying a large quantity of cocaine. Some two (2) hours after his arrest and after the drugs had been seized Depp claimed that one of his friends, the petitioner John Joseph Barone, Jr., was involved in the plan to import the cocaine. Depp was told to call Barone and ask to be picked up at the Cincinnati Airport (both he and Barone lived nearby), and to make an allusion to the drugs. He called, asked to be picked up, but said nothing during the monitored conversation about narcotics. Upon his arrival accompanied by two (2) agents of the D.E.A. from Miami, Depp was met by Barone who

carried some of Depp's luggage from the concourse to his (Barone's) waiting automobile. Absolutely no evidence beyond Depp's accusation provided an independent basis for Barone's arrest. He has asserted his innocence from the moment he was arrested.

Agent Ginetz's first and only involvement in the investigation of the case occurred at the Cincinnati Airport. He watched Depp meet Barone; he viewed the actual arrest; he spoke to Depp for the first time only *after* the arrest. Ginetz then sought his warrant, representing to the magistrate that:

> This affiant received information from an informant, who has provided *me with information which has been reliable and on which arrest have* (sic) *been based and a considerable quanity* (sic) *of narcotics have* (sic) *been confiscated* (sic) *on July 6th and 7th of 1975.* (emphasis added)

In fact, the relevant events of July 6 were the arrest of Depp and his accomplice and the seizure of the cocaine, both of which occurred before Depp spoke to Ginetz or any other agent. Similarly, the only arrest on the 7th was Barone's and that rested on nothing more than Depp's accusation. Nor was this accusation independently corroborated, since Barone's actions were entirely consistent with innocence: he was called and asked to pick up a friend at the airport; he did, helped him carry luggage, and was promptly arrested. Further, Ginetz's representations to the magistrate were not only inaccurate but, being within his own knowledge, were unquestionably intentional or reckless as well.

Notwithstanding the above, the trial court overruled a Motion to Suppress, holding from the bench that any

discrepancies contained in the Affidavit had their genesis in Depp's statements to the agent and that, further, Depp's credibility and reliability were established by his own inculpatory statements, citing *United States v. Harris*, 403 U.S. 573 (1971).

The Court of Appeals upheld the trial court, holding that although "the facts recited in the Affidavit could more accurately and fully have reflected the source of the affiant's information and the basis for probable cause * * * * Any inaccuracies in the Affidavit statement concerning the arrests and seizures were minor." A dissent was filed, by Judge Keith, holding that the admitted inaccuracies were not minor and, involving facts particularly within the personal knowledge of the affiant, were at least a reckless misstatement falling within the proscription of *Franks v. Delaware*, ... U.S. ....., 46 U.S.L.W. 4869, 4872 (June 26, 1978). Judge Keith further felt that the federal court should exercise its supervisory power to quash warrants which were the product of intentionally misleading affidavits.

B. The Motion to Dismiss the Indictment

The petitioner filed a Motion to Dismiss the indictment. The motion was denied by the trial court. The Court of Appeals affirmed.

Following Barone's arrest, the matter was presented to a grand jury sitting in the Southern District of Ohio. In December of 1975, and again in March of 1976, evidence was presented to the grand jury. Although approximately 15-20 witnesses testified and Barone's personal and business records were subpoenaed, this grand jury refused to indict. The transcript of the proceedings was never released to Mr. Barone.

Following the action of the federal grand jury in Ohio, and seventeen (17) months after the arrest, one of the D.E.A. agents who participated in the arrest in Cincinnati took the investigative file to an Assistant United States Attorney in the Eastern District of Kentucky. Another grand jury was empaneled there and *only* the single agent testified. Although the failure of the Eastern District to preserve testimony before grand juries prevents the defendant (or the government) from reconstructing the proceedings, it was admitted, at trial, that no new evidence was secured after the original presentation in the Southern District of Ohio. Further, since the agent who testified was involved only in the actual arrest, virtually everything about which he testified must have been hearsay. Not only does the Eastern District of Kentucky fail to record grand jury testimony, but at trial, the District Court refused to allow the agent to recount his own grand jury testimony. Rather than acknowledging that the right to maintain the secrecy of his testimony was one belonging to the witness, the Court barred inquiry upon the prosecutor's objection irrespective of the witness's wishes.

REASONS FOR GRANTING THE WRIT

A. Search and Seizure

1. This case presents an opportunity for the Court to further define the ruling of Franks v. Delaware, ... U.S. ..... (decided June 26, 1978) and to apply the rationale thereof to the federal courts in the exercise of its supervisory power.

This Court, on June 26, 1978, considered for the first time the question of a defendant's right to pierce the previously almost-irrebuttable presumption of regularity surrounding affidavits for search warrants. *Franks v. Delaware*,..... U.S. ....., 46 U.S.L.W. 4869 (decided June 26, 1978). The facts in *Franks* centered about a state's near-absolute policy precluding the introduction of evidence which would tend to impeach the veracity of an affidavit for search warrant.

In this case, the warrant was obtained by an agent of the federal government, from a State judge, pursuant to Rule 41, F.R.Cr.P. The agent, apparently in an attempt to satisfy the requirements of *Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964), represented to the Magistrate that the informant who supplied the information contained in the Affidavit was credible and that he had supplied the agent with verified information in the past. At best that representation was a liberal exaggeration; at worst, an outright deception. Although two of the members of the panel characterized the misstatements as "minor inaccuracies" the dissenting judge agreed with this petitioner, holding that:

> I fail to see how the majority can characterize the [inaccuracies and ambiguities] as minor. The statements appeared to have been falsely made and a deliberate obfuscation of the truth in order to show the credibility and reliability of the informant * * *

Prior to *Franks*, and the case at bar, the Court of Appeals for the Sixth Circuit had applied a prophylactic standard to affidavits containing intentional misstatements. Regardless of the materiality of the information, suppression was ordered if the misstatements were *intentionally* made. *United States v. Luna*, 525 F.2d 3 (6th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976). Such a standard was imposed in order to "deter police misconduct and safeguard the integrity of the judicial process." *United States v. Luna*, *supra* at 8-9. It was undoubtedly felt that such a stringent standard was required since a mere excision of the false statement and a reexamination of the affidavit would provide no control at all over the unscrupulous agent. He could include false statements in close cases with impunity, knowing that even if discovered, he (or the affidavit) would be in no worse position than if an honest presentation had been made to the magistrate in the first instance. The Supreme Court of California recently supported such reasoning in *People v. Cook*, ... P.2d ....., 24 Cr.L.Rptr. 2004 (decided 9/8/78). Now, following this Court's decision in *Franks*, the Sixth Circuit appears ready, at least in *dicta*, to abandon the standard of *Luna*, appearing to view the holding of *Franks* as imposing an outer limit of sanction beyond which the lower courts may not go.

Virtually all the other Circuits have addressed this issue in federal prosecutions and have arrived at a multiplicity of approaches. *See Franks, supra*, ... U.S. at ....., 46 U.S.L.W. at 4880 n.4. It is reasonable to assume

that, unless this Court speaks to the issue, the lower courts will continue to be confused and divergent in their attempts to apply the standards of *Franks* to federal prosecutions. The recent ruling of the Supreme Court of California vividly points out that confusion and diversity among the various jurisdictions is inevitable. *See People v. Cook*, *supra*. *See also, State v. La Martiniere*, ... So.2d ....., 24 Cr.L.Rptr. 2427 (La.Sup.Ct., decided 9/5/78).

This case presents a vehicle wherein the Court may set a national standard, under its supervisory power, for federal cases involving the intentional misstatements of federal agents in drafting affidavits in support of applications for search warrants.

2. There exists an almost universal misconception as to the holding in United States v. Harris, 403 U.S. 573 (1971), which is generally cited for a proposition supported by only a minority of the Supreme Court in that case.

The district court grounded its denial of the motion to suppress, and the Court of Appeals affirmed, at least in part, on the rationale of *United States v. Harris*, 403 U.S. 573 (1971). Both courts held, without analysis, that the informant (Depp) was rendered credible by virtue of allegedly inculpatory statements he made to the investigating officer.

Factually, the statements made by Depp were made after his arrest and were revealed as exculpatory. He simply attempted to share the blame for an act to which he had already confessed and for which he had already been arrested. He admitted that he accused the petitioner because he was told that unless he was able to lead the agents to someone else he could expect a sentence of eight years. The failure of this Court to clarify the holding

in *Harris* has led to the incongruous result that an attempt to shed blame, to simply point the finger at another in return for sentencing consideration, somehow vests the informant with credibility. Even the less stringent standards applied to credit hearsay generally would not serve to legitimize these statements.

Further, petitioner respectfully submits that, while *Harris* is widely cited for the proposition that inculpatory statements can provide grounds for crediting an informant's statements, a majority of this Court has never joined in such a holding. In *Harris*, only four justices concurred in Part III of the opinion which credited the informer's statements by his declaration against penal interest. *Harris*, 403 U.S. at 585, 586-94. It should also be noted that neither the petitioner nor the United States specifically raised or briefed that issue in that case. *See generally*, Government's *Petition for a Writ of Certiorari, United States v. Harris*; *See also, Brief of United States, United States v. Harris*, 403 U.S. 573 (1971).

An opportunity to clarify the holding in *Harris* should by itself provide a reason for this Court to grant the *Writ of Certiorari* in the instant case.

B. The Grand Jury Proceedings

1. This case presents a fact-pattern within which the Court may define minimum standards for the presentation of evidence to grand juries and the preservation of the record of testimony taken therein.

Over the past twenty (20) years, this Court has on repeated occasions addressed, in a peripheral fashion the role and function of the grand jury in our constitutional structure of criminal justice. The cases have taken two

separate paths. One line of decisions has focused on the grand jury's investigative function and has emphasized that proceedings before grand juries are non-adversarial in character and cannot, therefore, be bound by the strict rules of evidence and procedure appropriate in a federal judicial proceeding. By contrast, the second line of cases has focused on the institution's protective function and has reaffirmed the fundamental constitutional principle that the grand jury stands between the populace and the danger of oppressions by the Executive Branch.

In *Costello v. United States*, 350 U.S. 359 (1956), this Court approved the use of expert, hearsay, evidence in a case involving a highly complex matter of tax evasion. In *United States v. Dionisio*, 410 U.S. 1 (1973), it was held that the grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it and that jurors may therefore act on tips, rumors or evidence offered by the prosecutor as well as on their own personal knowledge. Even evidence concededly obtained in an illegal manner may support an indictment. *United States v. Calandra*, 414 U.S. 338 (1974).

In juxtaposition to the above are decisions like *Branzburg v. Hayes*, 408 U.S. 665 (1972), which continue to reiterate the dual character of the grand jury's basic constitutional responsibilities: "determination whether there is probable cause to believe a crime has been committed *and the protection of citizens against unfounded criminal prosecutions.*" *Id.* at 588-87 [emphasis added]. Protection of the citizenry from an overzealous prosecutor has been an announced purpose of grand juries since the drafting of the Fifth Amendment. *See, e.g., Ex parte Bain*, 121 U.S. 1, 11 (1887).

Unfortunately, this Court has not had an opportunity to draw a balance between those often competing policies. As a result, some prosecutors have seized upon the more direct language of the *Costello-Calandra* line of cases as authority to infringe upon the autonomy of the grand jury, reducing it to a sword of the prosecution.

Given the dichotomy reflected above, no real direction exists for the conduct of grand juries. As Prof. Charles Ruff, former Watergate Prosecutor, has said:

> * * * most of what happens inside the grand jury room is not governed by statute or case law. It is the prosecutor who fills this legal vacuum, and his discretion is exercised within parameters that are only vaguely defined.
>
> * * * * *
>
> I suggest that virtually the only restraints imposed on the prosecutor's use of the grand jury are those which he imposes on himself as a matter of his personal and professional morality or which are imposed on him as a matter of policy by his superiors. On occasion, it is clear, such restraints are ineffective, and decisions are made and actions taken that, whatever their legality, transgress the limits of prosecutorial discretion. (Professor Charles Ruff, speech at the 1975 Judicial Conference of the District of Columbia).

The grand jury had become such a tool of the prosecutors in the Southern District of New York that indictments were virtually insured by the presentation of what amounted to professional witnesses, recounting pure hearsay. The practice became so egregious that the Court of Appeals for the Second Circuit was forced to intercede. See *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972).

The Sixth Circuit has expressly declined to follow the *Estepa* rule in the instant case. See Opinion, App. A14.

In apparent recognition of the existing confusion, the American Bar Association has approached the matter at length in its Model Code of Pre-Arraignment Procedure. See §§330.4(4), 340.5 (Tent. Draft No. 5, 1972).

Both Houses of Congress have considered legislation to address what has become a national concern about the operation of grand juries. See S. 3274, 94th Cong., 2d Sess. (1976); H.R. 1160, 94th Cong., 2d Sess. (1976). *See also*, H.R. 94, 95th Cong., 1st Sess. (1977); S. 1449, 95th Cong., 1st Sess. (1977).

There are even those who perceive the abuses as having subsumed the body of the grand jury itself and seek its excision from the Fifth Amendment. *See, e.g.*, J. Kramon, *The Grand Jury: An Overview*, THE JOURNAL OF THE SECTION OF LITIGATION, ABA v.4, n.4, p. 8 (1978). Such a trend, once begun, could well result in the first alteration in our Bill of Rights in almost two hundred years. This petitioner urges the Court to exercise its supervisory powers to clarify the function of the grand jury and to move it back to its constitutional place as a protector rather than an inquisitor. As this Court has said, the grand jury is an arm of the judiciary, "subject to the supervision of a judge." *See, Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). In this case the petitioner seeks an exercise of that supervisory power at the ultimate level of authority, the Supreme Court of the United States, to clarify a split in the positions of the Circuit Courts of Appeal as well as to silence the uncertainty among courts and commentators generally on the operation and conduct of the grand jury in our system of criminal justice.

CONCLUSION

It is respectfully submitted that a *Writ of Certiorari* should be granted.

Respectfully submitted,

JOHN CZARNECKI
Counsel for Petitioner

APPENDIX A

Opinion of the Court of Appeals for the Sixth Circuit

(Filed August 1, 1978)

No. 77-5238

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN JOSEPH BARONE, JR.,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Kentucky.

Before: CELEBREZZE, ENGEL, and KEITH, *Circuit Judges.*

ENGEL, *Circuit Judge*, delivered the opinion of the Court, in which CELEBREZZE, *Circuit Judge*, joined. KEITH, *Circuit Judge*, (pp. 16-18) filed a separate dissenting opinion.

ENGEL, *Circuit Judge.* John J. Barone, Jr. was convicted of possessing cocaine with intent to distribute it and of conspiring to distribute that drug, in violation of 21 U.S.C. §§ 841(a)(1) and 846. In his direct appeal he raises three issues. He challenges the validity of a search warrant for his residence, claiming that the underlying affidavit contained material misrepresentations of fact made by its affiant and that it was insufficient to establish

probable cause for the search. He claims that the grand jury system was abused by the government because the indictment was issued solely upon the hearsay testimony of an investigating officer, and because a grand jury convened earlier in another district had refused to indict after hearing numerous eyewitnesses. Finally, he claims that the district court erred in denying his motion for a new trial based upon a claim that newly-discovered evidence, withheld by the government, would have tended to exculpate him. We affirm.

THE SEARCH WARRANT

The warrant for the search of Barone's residence was issued by an Ohio state judge upon the affidavit of a special agent of the Drug Enforcement Administration (DEA). The physical evidence seized in the search, a microscope, a triple-beam balance, and a vial of lactose, was not introduced into evidence. Nevertheless, the government made full use of testimony that the triple-beam balance and vial of lactose were discovered in the search and were materials commonly used by persons in the business of distributing drugs.

The government's theory was that Barone and one Norman Richard Depp were partners in cocaine smuggling operations and that in furtherance of this conspiracy, Barone had given Depp $10,000 in cash to travel to Colombia, South America to purchase cocaine. The scheme was discovered when, on July 6, 1975, Depp and one Roma Sly disembarked from a flight at the Miami International Airport, having returned together from a trip to Colombia. Depp and Sly proceeded through customs checkpoints at separate locations. However, customs officials became suspicious when they observed Sly carrying a hair dryer. Disassembling it, they discovered approximately 3.3 pounds

of cocaine. Depp was also arrested while leaving the concourse and both were interrogated by DEA agents. The interrogation produced a confession by Depp and his identification of Barone as his partner. Having apprised the agents of their plans, Depp agreed to cooperate in an effort to make a "controlled" delivery to Barone of the cocaine found in the hair dryer. At the agent's urging, Depp called Barone and suggested that they meet at the airport serving Cincinnati, Ohio, which is actually located within Kentucky. The bulk of the cocaine was removed from the hair dryer and replaced by a flour-like substance. Depp then flew with the two agents to the Cincinnati area. Disembarking at the Cincinnati airport, Depp met Barone in the concourse from which they went to the baggage area. Depp carried the hair dryer with him and apparently handed it to Barone before purportedly going to check on the location of his luggage. Barone went to the parking lot and was arrested as he placed the hair dryer in the trunk of his car.

Based upon the foregoing facts and upon interrogation of Depp, one of the agents, Augustine Ginetz, filed an affidavit with the state judge which contained the following statement:

> This affiant received information from an informant, who has provided me with information which has been reliable and on which arrest have (sic) been based and a considerable quanity (sic) of narcotics have (sic) been confiscated (sic) on July 6th and 7th of 1975. The informant further states on this date, July 7th 1975, that on June 30th 1975, he was at the residence at 2575 Indian Creek Rd and personally observed a large quanity (sic) of marijuana, cocaine, amphetamines and barbituates which belong to John Joseph Barone, Jr. who is a resident at this address.

> The informant further states that on June 30th 1975 that John Joseph Barone, Jr, did give him $10,000.00 to go to Columbia (sic), South America to use to purchase cocaine, which he did. John Joseph Barone, Jr. was arrested by Federal Agents on July 7th 1975 when taking possession of the above purchase of cocaine. The informant further states that there is (sic) still large quanites (sic) of drugs at the residence at 2575 Indian Creek Rd, which he observed on June 30th 1975.

At a suppression hearing before the district court, counsel for Barone urged that certain statements concerning the reliability of the "informant" were false. Counsel also claimed that the allegation in the affidavit regarding the informant's observation of certain drugs at Barone's house was false. The government admitted that the unidentified informant was in fact Depp. After hearing the evidence, the district judge denied the motion to suppress, holding that the informant was reliable and that, whatever the truth might have been concerning whether the informant actually observed a large quantity of drugs in Barone's residence on June 30, 1975, he had in fact made that statement to the officer.

On appeal Barone makes two claims with respect to the validity of the search warrant. While he admits that the affidavit was facially sufficient to meet the two-prong test of *Aguilar v. Texas*, 378 U.S. 108 (1964), he claims that Agent Ginetz intentionally misrepresented facts in the affidavit. He also claims that, in looking behind the face of the affidavit, the true facts as shown at the hearing of the motion to suppress were not sufficient to support probable cause.

In *United States v. Luna*, 525 F.2d 4 (6th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976), our court dealt with

the problem of whether a search warrant may be invalidated where it is claimed that the statements in the affidavit, which appear sufficient to establish probable cause on their face, are in fact not true:

> [I]t must be recognized that law enforcement agents presenting evidence to magistrates could make a mockery of the magistrate's role if, in the necessarily ex parte proceeding, they could freely employ false allegations in order to secure the warrant. The same could likewise be true if the agents could, with impunity, draft affidavits with utter recklessness as to truth or falsity. In either instance there would be a lack of good faith in the performance of the agent's duty to the judicial officer.
>
> There are two circumstances which we believe authorize the impeachment of an affidavit which on its face is sufficient probable cause for issuance of the warrant. The first of these consists of knowing use of a false statement by the affiant with the intent to deceive the court. This is true even if the statement can be said to be immaterial to the issue of probable cause. In our judgment such perjury must lead to suppression of the evidence in order to prevent fraud upon the judicial process.
>
> The second circumstance arises when a law enforcement agent recklessly asserts a statement essential to establishment of probable cause and the charge is subsequently made that the statement is both false and recklessly made. In alleging recklessness, the movant must offer affidavits 1) that the statement sought to be attacked was false when made, and 2) that when made the affiant did not have reasonable grounds for believing it. At a hearing on such a charge, it will be important for the District Judge

to determine whether means had been available to the agent to establish the truth or falsity of the statement without such delay as would defeat a legitimate law enforcement purpose.

On the other hand, we do not believe that good faith error in a carefully prepared search warrant affidavit should be held to require suppression of evidence even where the erroneous allegation was essential to establishment of probable cause. As we see the matter, the suppression rule can hardly be expected to prevent human error. It should be employed to strike down perjury and to promote careful police work.

525 F.2d at 8-9.[1]

The Supreme Court has also recently addressed the issue of when a defendant may attack the veracity of a warrant affidavit after the warrant has been issued and executed. In *Franks v. Delaware*, 46 U.S.L.W. 4869 (U.S. June 26, 1978), the Court summarized its ruling:

> [W]e hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause,

1. Our circuit has on at least two other occasions had an opportunity to apply the rule in *Luna*. In *United States v. Rosenbarger*, 536 F. 2d 715, 720 (6th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977), we held that there was no basis for suppression where the affiant was not aware of an inaccuracy in his statement and there was no evidence that the false information was recklessly asserted. And, in *United States v. Roberts*, 548 F. 2d 665 (6th Cir.), *cert. denied*, 431 U.S. 920, 931, 433 U.S. 913 (1977), Judge Lively, speaking for the court, held that certain inaccuracies in the affidavit were not material to the issue of probable cause and resulted from a good-faith error.

> the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

46 U.S.L.W. at 4870.

In striking a balance between competing considerations the Court adopted a similar standard, but one that is more limited than *Luna*, in regard to when exclusion of the seized evidence is mandated. In *Luna* we decided that a knowing and intentional use of a false statement by the affiant will invalidate the warrant, even if the representation is immaterial to the probable cause determination. However, it is clear that *Franks v. Delaware* requires that, even in such an instance of perjury, the warrant will be voided only if the false statement is necessary to establish probable cause. The defendant must prove "by a preponderance of the evidence" that the "affidavit's remaining content is insufficient to establish probable cause." Thus a defendant must now look to *Franks v. Delaware* for the correct standard when seeking to attack a search warrant on this basis.[2]

2. The dissent suggests that our court should exercise its supervisory powers to retain the stricter standards of *Luna* for application to federal prosecutions. Since our opinion here finds the search and seizure lawful under either standard, we need not definitively address this issue. At the same time, it is worth observing that dual standards in this field of law pose particular difficulties for law enforcement officers since with great frequency federal prosecutions must rely upon evidence gathered by state and local law enforcement officials. Here, of course, the affiant was a federal officer, but the warrant was issued by a state judicial officer.

Barone claims that the only information possessed by Ginetz at the time he made out the affidavit was that obtained from the surveillance, search, and interview of Depp in Miami and the arrest of Barone at the Cincinnati airport. At trial Ginetz admitted that he met "informant" Depp for the first time on July 7, 1975, shortly after Barone had been arrested and that prior to the time of his arrest Depp had never furnished the government with any information. For these reasons alone defendant insisted in the district court that the warrant affidavit was false insofar as it stated that Depp had "provided me with information which has been reliable." On appeal Barone suggests for the first time additional reasons for finding inaccuracies in the affidavit concerning the informant's reliability. He argues that it was false to state that the informant's information led to arrests and seizures of narcotics on July 6th and 7th. The only relevant arrests on July 6th were those of Depp and Sly, and Depp's information could not have contributed in any manner, Barone contends, to his own arrest and his companion's. Similarly, the seizure of cocaine on July 6th occurred before Depp had even been arrested. Finally defendant claims that it was inaccurate to state that a drug seizure occurred on July 7th, because at most the DEA agents recovered the very cocaine they had placed in Barone's hands.

We can agree that the facts recited in the affidavit could more accurately and fully have reflected the source of the affiant's information and the basis for probable cause. At the same time, we take into account the admonition of the Supreme Court in *United States v. Ventresca*, 380 U.S. 102, 109 (1965), that:

> [W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense manner.

Applying the test of either *Franks v. Delaware* or *Luna*, we conclude that the district judge did not err in refusing to suppress the evidence.[3] Any inaccuracies in the affidavit statement concerning the arrests and seizures were minor. The statement itself contains some ambiguity as to its meaning, and we think it was the product of inartful drafting, rather than any intent to deceive the state judge. In addition, the facts in the affidavit adequately show the informer's reliability. That some of the statements necessarily were against the penal interest of the informant weighs heavily in support of his reliability and is, we have held, a "significant, and sometimes conclusive, reason for crediting the statements of an informant." *Armour v. Salisbury*, 492 F. 2d 1032, 1035 (6th Cir. 1974). The specific details recited by the informant concerning his relationship with Barone, corroborated by the agent's own personal contact with the informant, adds substantial weight to his reliability. Counsel's assertion that the informant did not visit Barone's home on June 30, 1975 finds support only in the testimony of Barone, not in the testimony of Depp. Whether Depp in fact entered the home on that date and observed the contraband, the testimony was undisputed that Depp stated to Ginetz that he had observed drugs in Barone's residence on that occasion. The trial judge held

---

3. For the purposes of this appeal we assume that the issue of the search warrant's validity is properly before us. However, we note that Rule 12, Fed. R. Cr. P., requires that a motion to suppress be made prior to trial and states that the failure timely to raise such an objection shall constitute a waiver. Upon a showing of "cause" though, the Rule allows the court to consider an untimely motion. Here, the suppression motion was not made until midway through the trial, and while the record does not suggest an explanation for the delay, the trial judge's ruling indicates that he may have implicitly found reasons to waive the requirement.

a full and fair evidentiary hearing. His findings, made after personally hearing the witnesses, are not clearly erroneous.

GRAND JURY INDICTMENT PROCEDURE

Barone was arrested on July 7, 1975. Thereafter a complaint was filed against him in the United States District Court for the Southern District of Ohio. After a preliminary hearing on July 22, 1975, the case was presented to the grand jury for the Southern District of Ohio, which heard testimony in September and December of 1975, and apparently again in March, 1976. While at least ten persons appeared before the grand jury, a "no bill" was returned on April 1, 1976. Thereafter, the matter was presented to a second grand jury, which was empaneled by the United States District Court for the Eastern District of Kentucky. At this proceeding only one witness, DEA Agent Thomas Powell, testified. The instant indictment was then returned against Barone charging both conspiracy and the substantive offense of possession with intent to distribute the cocaine.

Defendant filed two pretrial motions seeking to have the indictment dismissed or quashed. Allegations of a violation of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, which were embodied in the first motion, are not raised on this appeal. The second motion, orally denied by the district court, sought dismissal on the grounds that the prosecutor had failed to apprise the Kentucky grand jury of the fact that the matter had earlier been presented to a grand jury in Ohio, that a large number of witnesses had been presented to that grand jury, and that a no bill had been returned.

We do not, of course, know precisely why the grand jury failed to return a true bill in Ohio nor why the government sought first to present the facts in the Southern District of Ohio instead of in the Eastern District of Kentucky where the substantive offense and the arrest occurred. Since overt acts of the conspiracy occurred in both districts, it was proper to have presented the evidence to a grand jury in either district, although probably more logical to have done so in Eastern Kentucky. *See United States v. Prueitt*, 540 F. 2d 995, 1006 (9th Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

Both the defendant and the government agree that federal law does not forbid the resubmission of evidence to a grand jury after one or more previous grand juries have refused to indict. *United States v. Thompson*, 251 U.S. 407 (1920). Likewise, the defense basically recognizes the general rule that a criminal indictment is valid even though it may have been based solely upon hearsay evidence. For an understanding of the historical background of grand jury proceedings, *Costello v. United States*, 350 U.S. 359 (1956), is instructive:

> The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the

grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor. As late as 1927 an English historian could say that English grand juries were still free to act on their own knowledge if they pleased to do so. And in 1852 Mr. Justice Nelson on circuit could say "No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof . . . ." *United States v. Reed*, 27 Fed. Cas. 727, 738.

In *Holt v. United States*, 218 U.S. 245, this Court had to decide whether an indictment should be quashed because supported in part by incompetent evidence. Aside from the incompetent evidence "there was very little evidence against the accused." The Court refused to hold that such an indictment should be quashed, pointing out that "The abuses of criminal practice would be enhanced if indictments could be upset on such a ground." 218 U.S., at 248. The same thing is true where as here all the evidence before the grand jury was in the nature of "hearsay." If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be

> that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

350 U.S. at 362-63 (footnotes omitted).

The continuing authority of *Costello* has been recently reaffirmed, at least in dictum, in *United States v. Calandra*, 414 U.S. 338 (1974), which upheld an indictment in the face of a charge that it was procured through illegally-obtained evidence:

> The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. . . .

414 U.S. at 344-45. The principle has also been recently recognized in our own circuit in *United States v. Solimine*, 536 F.2d 703 (6th Cir.), *vacated on other grounds*, 429 U.S. 990 (1976), *judgment modified*, 551 F.2d 124 (6th Cir. 1977).

Notwithstanding this formidable authority, appellant urges upon us a divergent view followed by the Second Circuit in *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972). There the Second Circuit reversed the defendants' convictions and remanded with instructions to dismiss an indictment which had been procured by what was held to be improper use of hearsay testimony. The record

indicated that the hearsay declarant did not, in his testimony before the grand jury, make it clear that his testimony was not from his own personal knowledge but was rather based upon the observations of others. Noting the court's repeated dissatisfaction with the continued, excessive use of hearsay in obtaining indictments in the circuit, Judge Friendly observed:

> The many opinions in which we have affirmed convictions despite the Government's needless reliance on hearsay before the grand jury show how loathe we have been to open up a new road for attacking convictions on grounds unrelated to the merits. We have been willing to allow ample, many doubtless think too ample, latitude in the needless use of hearsay, subject to only two provisos—that the prosecutor does not deceive grand jurors as to "the shoddy merchandise they are getting so they can seek something better if they wish," United States v. Payton, *supra*, 363 F.2d at 1000 (dissenting opinion), or that the case does not involve "a high probability that with eyewitness rather than hearsay testimony the grand jury would not have indicted."
>
> * * *
>
> We had hoped that, with the clear warnings we have given to prosecutors, . . . and the assurances given by United States Attorneys, see United States v. Arcuri, *supra*, 405 F.2d at 693 & n. 4, a reversal for improper use of hearsay before the grand jury would not be required.

471 F.2d at 1137 (citations omitted)[4]

4. The only case in our circuit discussing this Second Circuit line of authority is *United States v. Fife*, ... F. 2d ....., Nos. 76-1366, 76-1367 (6th Cir., filed Dec. 21, 1976), which did not consider the wisdom of the *Estepa* rule as the facts therein did not present such a claim.

Barone does not assert the violation of a specific constitutional right. Instead he urges that we should exercise our supervisory powers to reverse and direct the dismissal of the indictment because the totality of circumstances here were unfair. While he does not directly claim that Agent Powell led the Kentucky grand jury into a mistaken belief that his testimony was entirely firsthand, he complains that the failure to record the grand jury minutes and restrictions on his cross-examination of a government witness, Agent Powell, effectively precluded him from exposing any irregularities in the proceedings.[5] Finally, he claims it was unfair to seek and obtain through the hearsay evidence of one federal agent what could not be obtained through the direct testimony of ten eyewitnesses.

While we are not disposed to follow the rule of the Second Circuit in *Estepa*, we observe that the standards set forth by Judge Friendly in that case were not violated here in any event. There is not the slightest indication, and Barone has never contended, that Agent Powell deceived the grand jury during his testimony. He was, in fact, an eyewitness to many of the circumstances which

5. Near the end of the government's case at trial, Agent Powell testified, out of the jury's presence, concerning his participation in the second grand jury proceeding. He stated that he had presented the investigatory file on Barone to the United States Attorney's office in Kentucky and informed one of the Assistant United States Attorneys that a Cincinnati grand jury had returned a no bill. He implicitly conceded that he had been the sole witness to testify before the Kentucky grand jury.

Barone's attorney asked Agent Powell what information he had furnished to the second grand jury which the first grand jury did not possess and which he acquired after the date of the arrest. Apparently this inquiry was made in an effort to show that the second grand jury did not receive additional incriminating evidence and thus it would have likewise returned a no bill if excessive hearsay testimony by Powell had not been presented. The government objected to this question. The court sustained the objection regarding what Powell's actual testimony had been, but allowed him to state that basically he had no personal knowledge of additional inculpatory information that was discovered after the first grand jury proceeding.

occurred, and he was one of the agents who participated in the arrest of Barone.

From an examination of the record, it also appears that whatever the propriety of the trial court's ruling excluding testimony concerning Agent Powell's testimony at the first grand jury proceeding, the defense, by rephrasing the questions, was able to elicit fully the answers it desired.[6] Finally, while we have expressed our observation that it would be a better practice to make and preserve a record of grand jury testimony, this has never been required, and there is nothing in the facts here which disposes us to change this well-established rule of our circuit. *United States v. Solimine, supra,* 536 F. 2d at 707; *United States v. Allen,* 522 F. 2d 1229 (6th Cir. 1975), *cert. denied,* 423 U.S. 1072 (1976); *United States v. Battisti,* 486 F. 2d 961, 963 (6th Cir. 1973).

In conclusion, while we do not foreclose the possibility of an abuse of the grand jury system so egregious as to warrant intervention by the use of our supervisory powers, such a circumstance clearly does not exist here, and we are not inclined to adopt the position of the Second Circuit in *Estepa.* The strong historical policy considerations pointed out by the Supreme Court in *Costello* persuade us that this is the correct result. We are especially reluctant to see the trial of criminal cases further attenuated by preliminary trials concerning the adequacy of the grand jury proceedings, a concern particularly noted in *Costello.*

THE MOTION FOR A NEW TRIAL

Finally, defendant has appealed from the denial of his motion for a new trial, claiming that a later investiga-

6. See footnote 5 *supra.*

tion showed that an answer given by the chief prosecution witness, Depp, was in fact false and that the government's failure to deliver this information to the defense violated the requirement of the Due Process Clause as enunciated in *Brady v. Maryland,* 373 U.S. 83 (1963). The newly-discovered evidence was that one Mary Shaberg, a female who lived with Depp at the time he was arrested, gave testimony during the first grand jury proceeding which was inconsistent with that given by Depp, concerning who, in fact, Depp had called by telephone when he arrived in Miami from Colombia, but prior to his arrest. In a carefully written opinion, the district judge, examining the evidence in the light of the other proofs at trial, denied the motion, holding that at best the testimony showed a discrepancy which, while it may have had some bearing upon Depp's credibility, did "not create a reasonable doubt of guilt that did not otherwise exist after the trial, and, therefore, the omission does not amount to constitutional error." The district court was clearly correct in denying the motion.

Affirmed.

KEITH, *Circuit Judge,* dissenting. I respectfully dissent. Appellant claims that DEA Agent Ginetz intentionally misrepresented certain facts in his affidavit to support the issuance of the search warrant to search appellant's residence. Appellant argued at the suppression hearing that statements contained in the affidavit concerning the reliability of the unidentified informant were false. Agent Ginetz obtained the search warranted based upon the following affidavit:

> *This affiant received information from an informant, who has provided me with information which has been reliable and on which arrest have (sic) been based and*

a considerable quanity (sic) of narcotics have (sic) been cinficated (sic) on July 6th and 7th of 1975. The informant further states on this date, July 7th 1975, that on June 30th 1975, he was at the residence at 2575 Indian Creek Rd and personally observed a large quanity (sic) of marijuana, cocaine, amphetamines and barbituates which belong to John Joseph Barone, Jr, who is a resident at this address. The informant further states that on June 30th 1975 that John Joseph Barone, Jr, did give him $10,000.00 to go to Columbia (sic), South America to use to purchase cocaine, which he did. John Joseph Barone, Jr. was arrested by Federal Agents on July 7th 1975 when taking possession of the above purchase of cocaine. The informant further states that there is (sic) still large quanites (sic) of drugs at the residence at 2575 Indian Creek Rd, which he observed on June 30 1975. (Emphasis Added)

The government admitted that Depp was the informant referred to in the affidavit.

In *United States v. Luna,* 525 F.2d 4 (6th Cir. 1975), *cert. denied* 424 U.S. 965 (1976), this Court set down a test which sought to deter police misconduct and safeguard the integrity of the judicial process. *Mapp v. Ohio,* 367 U.S. 643 (1961); *United States v. Luna, supra* at 8-9. We pointed out that law enforcement agents, if unchecked, could make a mockery out of a judicial officer's duty to reach a decision on the issuance of a search warrant in a neutral and detached manner. *Johnson v. United States,* 333 U.S. 10 (1948), This would be so if law enforcement agents were permitted to "employ false allegations in order to secure" search warrants and "if the agents could, with impunity, draft affidavits with utter recklessness as to truth or falsity." *United States v. Luna, supra* at 8.

Agent Ginetz admitted at trial that he met Depp, his informant, for the first time shortly after appellant Barone had been arrested and that Depp had never furnished the government with information in the past. Nevertheless, Agent Ginetz stated in his affidavit that Depp had provided him with reliable information upon which arrests had been made and narcotics confiscated on July 6 and 7, 1975. The only arrests made on July 6 were those of Depp and Sly, and Depp's information could not have contributed to his own arrest or that of his companion, Sly. The only arrest made on July 7 was that of appellant Barone, which took place prior to the time that Agent Ginetz met Depp. Moreover, the seizure of drugs at the Miami Airport was made prior to Depp's arrest. The arrests and confiscation of drugs therefore were made in spite of, not because of, Depp.

In my view, the inaccuracies and ambiguities contained in Agent Ginetz's affidavit were more than merely the the product of inartful drafting, and I fail to see how the majority can characterize them as minor. The statements appear to have been falsely made and a deliberate obfuscation of the truth in order to show the credibility and the reliability of the informant and thus meet the second prong of the test of an affidavit's sufficiency as announced by the Supreme Court in *Aguilar v. Texas,* 378 U.S. 108 (1964). See also *Spinelli v. United States,* 393 U.S. 410 (1969).

The *Luna* test articulated two circumstances which justify impeachment of an affidavit. The first circumstance goes to knowing use of false statements; the second goes to reckless use of false statements. Under the first application of *Luna,* this Circuit said:

> There are two circumstances which we believe authorize the impeachment of an affidavit which on its face is sufficient probable cause for issuance of the warrant. The first of these consists of *knowing use of a false statement by the affiant with intent to deceive the court.* This is true even if the statement can be said to be immaterial to the issue of probable cause. In our judgment *such perjury must lead to suppression of the evidence in order to prevent fraud upon the judicial process.* (Emphasis added)

525 F.2d at 8. Here Agent Ginetz, the affiant, stated that Depp had provided "*me* with information" (emphasis added) which had been reliable and upon which arrests had been made and narcotics confiscated. This statement was within the personal knowledge of the affiant and goes to the integrity of the affidavit. *Franks v. Delaware,* ..... U.S. ..... (1978), 46 U.S.L.W. 4869, 4872 (June 27, 1978); *Rugendorf v. United States,* 376 U.S. 528 (1964). The *Franks* decision set a minimum constitutional standard under which the Fourth Amendment mandates suppression of seized evidence in state and federal prosecutions. In my view *Franks* does not invalidate the concern expressed in this Circuit's decision in *Luna* that where a falsely drawn affidavit perpetrates fraud upon and makes a mockery of the judicial process, the affidavit may be impeached.[1] In *Luna* this Circuit enunciated a stricter standard to address this evil. In the exercise of this Court's supervisory powers, the *Luna* test should be applied in federal prosecutions. The motion to suppress here should have been granted and the conviction should be reversed.

---

1. *United States v. Roberts,* 548 F.2d 665 (6th Cir.), *cert. denied* 431 U.S. 920 (1977), and *United States v. Rosenbarger,* 536 F.2d 715 (6th Cir. 1976), *cert. denied* 431 U.S. 935 (1977), do not suggest a different result.

APPENDIX B

Judgment Entry of the Court of Appeals for the Sixth Circuit

(Filed August 1, 1978)

No. 77-5238

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN JOSEPH BARONE, JR.,
Defendant-Appellant.

JUDGMENT

Before: CELEBREZZE, ENGEL and KEITH, *Circuit Judges*

Appeal from the United States District Court for the Eastern District of Kentucky.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN A. HEHMAN
Clerk

APPENDIX C

Order of the Court of Appeals Denying Petition for Rehearing

(Filed September 26, 1978)

77-5238

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN JOSEPH BARONE, JR.,
Defendant-Appellant.

ORDER

Before: CELEBREZZE, ENGEL and KEITH, *Circuit Judges*

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit. Accordingly,

IT IS ORDERED that the petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN A. HEHMAN
Clerk

Supreme Court, U. S.
FILED
DEC 19 1978
MICHAEL RODAK, JR., CLERK

No. 78-694

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN JOSEPH BARONE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT J. ERICKSON
PAUL J. BRYSH
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-694

JOHN JOSEPH BARONE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 584 F. 2d 118.

JURISDICTION

The judgment of the court of appeals (Pet. App. A21) was entered on August 1, 1978. A petition for rehearing was denied on September 26, 1978 (Pet. App. A22). The petition for a writ of certiorari was filed on October 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the affidavit submitted in support of an application for a warrant to search petitioner's house contained material misrepresentations.

2. Whether the indictment should have been dismissed because hearsay evidence may have been presented to the grand jury or because a grand jury in another district previously refused to indict petitioner.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of conspiring to possess and distribute cocaine, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of six years' imprisonment, followed by a special parole term of four years. A divided panel of the court of appeals affirmed (Pet. App. A1-A20).

The evidence at trial showed that in July 1975 Norman Depp and Roma Sly traveled to Colombia, where Depp purchased approximately 3.3 pounds of cocaine for $11,000. Depp testified that he had obtained $10,000 of this sum from petitioner in Cincinnati and that he and petitioner had agreed that he, Depp, would buy as much cocaine as he could get for the money (Tr. 11-16, 19-21, 25). [1] On their return to Miami on July 6, 1975, Depp and Sly were arrested after a customs inspector found the cocaine concealed in a hair dryer that Sly was carrying (Tr. 22, 26-27; II Tr. 353-354; III Tr. 427-430). In response to questioning by Drug Enforcement Administration agents, Depp confessed his involvement in the cocaine importation scheme and identified petitioner as his partner. The agents then persuaded Depp to arrange for petitioner to meet him at the Kentucky airport that serves Cincinnati (Tr. 31-33, 37-38; III Tr. 416-417).

[1] "Tr." refers to the transcript of defense counsel's opening statement and the testimony of Norman Depp. The remaining volumes of the trial transcript are designated with Roman numerals, and these will be used in references to those volumes.

The cocaine in the hair dryer was replaced with a mixture of cocaine and flour (Tr. 38; II Tr. 360), and Depp returned to Cincinnati. At the airport, he gave petitioner the dryer, and petitioner was arrested as he placed it in the trunk of his car (Tr. 40-43; II Tr. 334; III Tr. 438-440). Shortly thereafter, DEA agents obtained a search warrant from an Ohio state judge. The warrant authorized a search of petitioner's house. When the warrant was executed, DEA agents discovered a set of balance scales of a type often used in connection with narcotics distribution and a one-pound jar half filled with lactose, a substance commonly used as a narcotics dilutant (III Tr. 560-563, 567-568).[2]

ARGUMENT

1. Petitioner contends (Pet. 9-12) that the evidence obtained in the search of his house should have been suppressed. He argues that the affidavit submitted by DEA Agent Augustine Ginetz in support of the application for a search warrant contained misrepresentations concerning the reliability of the informant, Norman Depp. See *Franks* v. *Delaware*, No. 77-5176 (June 26, 1978). The affidavit, however, contained no such misrepresentations.

Agent Ginetz's affidavit is reproduced in the opinion of the court of appeals (Pet. App. A3-A4). The agent stated that he received information from an informant, that the information proved reliable, and that at least one arrest was based on the information received. Agent Ginetz reported that a considerable quantity of narcotics was confiscated on July 6 and 7, 1975, and that petitioner was arrested on July 7, 1975, as he took possession of cocaine purchased by the informant in Colombia. The affidavit

[2] The scales and lactose were not introduced into evidence, but a DEA agent testified that they were seized in the search (Pet. App. A2).

also stated that the informant said he had visited petitioner's home on June 30, 1975, and had seen a large quantity of narcotics and other drugs there.

Petitioner asserts that the affidavit implied that Agent Ginetz had received reliable information from the informant Depp before the events of July 6 and 7, 1975. Nothing in the affidavit supports such a reading. Agent Ginetz testified at trial and Depp provided descriptions of petitioner's house and car and that these descriptions were verified by federal and local law enforcement officers (III Tr. 544-547). See *Draper* v. *United States*, 358 U.S. 307 (1959). In addition, of course, petitioner's receipt of the hair dryer at the Kentucky airport and his placement of the dryer in the trunk of his car corroborated Depp's statements concerning petitioner's role in the cocaine importation scheme. Petitioner does not and cannot suggest that his arrest was not based on information provided by Depp. In light of petitioner's conduct at the airport near Cincinnati and the accuracy of Depp's descriptions of petitioner's house and car, Agent Ginetz had ample reason to state, at the time he prepared his affidavit, that the information obtained from the informant had proved reliable.[3] The agent's representations in support of the application for a search warrant

[3]Judge Keith dissented in the court appeals on the ground that the statements in the affidavit "appear to have been falsely made and a deliberate obfuscation of the truth in order to show the credibility and the reliability of the informant" (Pet. App. A19). As the discussion in the text demonstrates, Agent Ginetz's affidavit did not contain false statements, and there is no evidence of any deliberate attempt to mislead.

were true,[4] and accordingly the district court properly denied petitioner's suppression motion.[5]

2. Petitioner also contends (Pet. 12-15) that the indictment should have been dismissed because it was returned by a grand jury in the Eastern District of Kentucky after a grand jury in the Southern District of Ohio failed to return an indictment. Petitioner stresses that the grand jury in Kentucky heard only the testimony of DEA Agent Thomas Powell, whereas the grand jury in Ohio heard at least ten witnesses. This argument is insubstantial. Neither the second grand jury proceeding itself nor the manner in which evidence was presented at the proceeding involved any impropriety.[6]

[4]At trial, defense counsel suggested that, contrary to the statement attributed to the informant in the affidavit, Depp did not visit petitioner's house on June 30, 1975 (III Tr. 536-537). The argument was based on Depp's trial testimony, in which he stated that he and petitioner met at Depp's apartment on June 30 (Tr. 11). Petitioner does not now contend that the statement attributed to Depp in the affidavit was false. In any event, even if Depp incorrectly informed the affiant that he visited petitioner's house, it does not follow that the affiant was aware of any falsity. Indeed, at the suppression hearing, Agent Ginetz reaffirmed that Depp said he had visited petitioner's house (III Tr. 546-547). Misrepresentations made by reliable informants do not provide grounds for suppression of evidence unless the affiant had reason to believe that the information was not true. *Franks* v. *Delaware*, *supra*, slip op. 8-9; *Rugendorf* v. *United States*, 376 U.S. 528, 532 (1964).

[5]Petitioner argues (Pet. 11-12) that the district court and court of appeals erred in finding that the reliability of the informant's statements was enhanced because the statements were against his own penal interest (III Tr. 549; Pet. App. A9). See *United States* v. *Harris*, 403 U.S. 573, 583-584 (1971) (plurality opinion). As four members of the Court observed in *Harris*, the fact that a statement tends to inculpate the speaker ordinarily contributes to the statement's reliability. It is unnecessary to consider this factor here, however, because Depp's reliability was adequately established even without reference to the self-inculpatory nature of his remarks.

[6]After the grand jury proceedings in Ohio, the DEA submitted the case to the United States Attorney for the Eastern District of Kentucky because the United States Attorney for the Southern

Long ago this Court decided that a case may be presented to a second grand jury after the first grand jury has refused to indict. *United States* v. *Thompson*, 251 U.S. 407 (1920). The witness before the second grand jury in this case, Agent Powell, was one of the officers who arrested petitioner. He personally observed petitioner meet Depp at the airport, receive the hair dryer containing cocaine, and place the dryer in his car. III Tr. 435-439. Agent Powell may have relayed hearsay information to the grand jury in addition to his first-hand knowledge, but this is not grounds for dismissal of the indictment,[7] *Costello* v. *United States*, 350 U.S. 359 (1956).

As the court of appeals correctly observed (Pet. App. A13-A16), petitioner's reliance on *United States* v. *Estepa*, 471 F. 2d 1132 (2d Cir. 1972), is misplaced. There, the sole witness before the grand jury was a law enforcement officer with "extremely limited personal knowledge" about the case (*id.* at 1134). The grand jury was not made aware of his lack of first-hand knowledge; instead, the grand jury was misled into believing it was hearing direct testimony rather than hearsay. Here, by contrast, the witness had observed crucial events in the case, and

---

District of Ohio decided against pursuing the matter further (III Tr. 505-506). As the court of appeals observed (Pet. App. A11), petitioner was arrested at the Greater Cincinnati Airport in the Eastern District of Kentucky, and that district was the "more logical" venue for his prosecution.

[7]The grand jury proceedings were not recorded. As the court of appeals noted (Pet. App. A16), although the Sixth Circuit has recognized that the recording of grand jury testimony is the "better practice," it has never held that all grand jury testimony must be recorded and preserved. There is no constitutional requirement that grand jury proceedings be recorded, and petitioner is not entitled to relief from his conviction because a transcript of the proceedings leading to his indictment is unavailable. Petitioner's guilt was fully established at trial, and the jury's verdict cannot be impeached by challenging the strength of the evidence presented to the grand jury.

petitioner has not identified any reason to believe that the grand jury was misled as to the nature of his testimony. *Estepa* therefore does not support petitioner's challenge to his indictment. See *United States* v. *Marchand*, 564 F. 2d 983 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978); *United States* v. *Oliver*, 570 F. 2d 397, 402 (1st Cir. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT J. ERICKSON
PAUL J. BRYSH
Attorneys

DECEMBER 1978

DOJ-1978-12